

M e m o r a n d u m

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Subject : CERTIFIED RANGELAND MANAGEMENT LICENSING ISSUES

Please note that the following statements do not necessarily reflect the opinions or conclusions of the Attorney General himself or of the Office as a whole. They are part of a legal analysis conducted at the request of the Board of Forestry to assist with the implementation of the Certified Rangeland Management certification process. Any questions in regard to the content of this memorandum should be directed to the author.

ISSUE I: RECOGNIZING THAT LANDOWNERS ARE SPECIFICALLY EXEMPTED FROM THE PROFESSIONAL FORESTERS LAW WHEN PRACTICING ON THEIR OWN LANDS, IS A PERSON REQUIRED BY STATUTE AND REGULATION TO BE A CRM IN ORDER TO PRACTICE RANGE AND RANGELAND MANAGEMENT ON NON-FEDERAL, STATE, AND PRIVATE LANDS?

ANSWER: YES, WHEN THE RANGELAND MANAGEMENT INVOLVES ACTIVITIES UNDERTAKEN ON FORESTED LANDSCAPES.

ANALYSIS:

A. Landowners Are Specifically Exempted From the Professional Foresters Law When Practicing Rangeland Management on Their Own Lands

Public Resources Code section 757 provides that: "The provisions of this article do not apply to any landowner who is a natural person and who personally performs services of a professional forester, when such services are personally performed on lands owned by him."

B. Both Statutes and Regulations Have Established a CRM Certification

Public Resources Code sections 762 and 772 and California Code of Regulations, title 14, sections 1650 and 1651 provide for Board to issue certificates of specialization in one or more fields of forestry, including a Certified Rangeland Manager (CRM).

A CRM certification can be obtained instead of a license as a Registered Professional Forester. (Public Resources Code section 772.)

California Code of Regulations, title 14, section 1651(a) provides that a CRM is someone that provides professional forester services at the request of the landowner or hiring agent, relating to the application of scientific principles to the art and science of managing rangelands and range.

Professional forester services are defined by California Code of Regulations, title 14, section 1602(a). Specifically, a professional forester "performs services on forested landscapes applicable to "forestry". California Code of Regulations, title 14, section 753 limits the practice of forestry to only those activities undertaken on forested landscapes.

Forested landscapes are defined by California Code of Regulations, title 14, section 754 as:

. . . tree dominated landscapes and their associated vegetation types on which there is growing a significant stand of tree species, or which are naturally capable of growing a significant stand of native trees in perpetuity, and is not otherwise devoted to nonforestry commercial, urban, or farming uses.

At this time, there is no case law that further defines the term.

"Forestry" is further defined by section 753 as:

. . . the science and practice of managing forested landscapes and the treatment of the forest cover in general, and includes, among other things, the application of scientific knowledge and forestry principles in the fields of fuels management and forest protection, timber growing and utilization, forest inventories, forest economics, forest valuation and finance, and the evaluation and mitigation of impacts from forestry activities on watershed and scenic values, to achieve the purposes of this article. . . . However, public and private foresters are required to be licensed pursuant to this article when making evaluations and determinations of the appropriate overall combination of mitigations of impacts from forestry activities necessary to protect all forest resources.

Section 753 specifically excludes from the practice of forestry, as it related to a CRM, the act of mitigating or recommending mitigation of impacts from previous forestry activities on related watershed or ecological values within their area of professional expertise or when recommending those mitigations for proposed timber operations.

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C. A Person is Required to be a CRM in Order to Practice Rangeland Management

1. "Person"

The certification is limited to persons, as opposed to corporate or business entities. California Code of Regulations, title 14, section 1651(a) states that a CRM is a person. Public Resources Code section 755 states that "Person . . . means any natural person." California Code of Regulations, title 14, section 1604 further provides that: Registration shall be determined on the basis of individual personal qualifications. No firm, company, partnership, or corporation will be issued a professional foresters license or specialty certificate.

As the certification is being provided in place of an RPF registration, the same limitation would apply to the CRM certification.

2. Requirement of a Registered Professional Forester License

Pursuant to Public Resources Code sections 753, 766, and 4581, a forester is required to be licensed in certain circumstances, including, but not limited to: making evaluations and determinations of the appropriate overall combination of mitigations of impacts from forestry activities necessary to protect forest resources; when acting in the capacity of, or to using the title of, a professional forester; and when preparing a timber harvesting plan.

Public Resources Code section 753 provides in pertinent part that:

. . . The professions specified in Section 772 [including Certified Rangeland Management licensees] are not practicing forestry when mitigating or recommending mitigation of impacts from previous forestry activities on related watershed or ecological values within their area of professional expertise or when recommending those mitigations for proposed timber operations. However, public and private foresters are required to be licensed pursuant to this article when making evaluations and determinations of the appropriate overall combination of mitigations of impacts from forestry activities necessary to protect all forest resources.

Public Resources Code section 766 adds that: ". . . it shall be unlawful for any person to act in the capacity of, or to use the title of, a professional forester without being registered pursuant to this article, unless exempted from the provisions thereof."

Public Resources Code section 4581 requires that a timber harvesting plan be prepared by a registered professional forester.

3. "Rangeland Management"

Rangeland is defined in other areas of the Forest Practice Rules: California Code of Regulations, title 14, section 1561.1 and Public Resources Code section 4789.2.

California Code of Regulations, title 14, section 1561.1 (under the Chaparral Management Chapter) states:

"Rangeland" means the land on which the existing vegetation, whether growing naturally or through management, is suitable for grazing and browsing. "Rangeland" includes any natural grasslands, savannas, shrublands, deserts, woodlands, and wetlands which support a vegetative cover of native grasses, grass-like plants, forbs, shrubs, or naturalized species. "Rangeland" is land that is dominated by vegetation other than trees. Many woodlands (including Eastside ponderosa pine, pinyon, juniper, chaparral, and oak woodlands) are included in "rangelands" because their response to range management principles and activities are similar to those of other shrubby ecosystems.

Public Resources Code section 4789.2 (as it relates to Forests, Forestry and Range and Forest Lands) states that:

(e) "Forest and rangeland resources" means those uses and values associated with, attainable from, or closely tied to, forest and rangelands, including fish, range, recreation, timber, watershed, wilderness, and wildlife.

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(i) "Rangeland" means land on which the existing vegetation, whether growing naturally or through management, is suitable for grazing or browsing of domestic livestock for at least a portion of the year. Rangeland includes any natural grasslands, savannas, shrublands (including chaparral), deserts, wetlands, and woodlands (including Eastside ponderosa pine, pinyon, juniper, and oak) which support a vegetative cover of native grasses, grasslike plants, forbs, shrubs, or naturalized species.

4. "Range Management"

It is important to note that there is no specific definition of the term of "range management," as opposed to "rangeland management." The terms appear to be used interchangeably.

California Code of Regulations, title 14, section 1651 and Public Resources Code sections 731 and 741 mention the terms "managing . . . range," "range management," and "range manager."

Also, Sections 731 and 741 fall under the article of statutes that concern the Board but are not included in the article that governs Professional Foresters.

Should future legislation be drafted in regard to the CRM certification program, this area of ambiguity should be addressed.

D. CRM Certification is Required for Non-Federal, State, and Private Lands

The Board is charged with protecting the forest resources of all the wildland areas of California that are not under federal jurisdiction. These resources include: major commercial and non-commercial stands of timber, areas reserved for parks and recreation, the woodland, brush-range watersheds, and all such lands in private and state ownership that contribute to California's forest resource wealth. Board of Forestry and Fire Protection History, Organization and Mandate, September 2004, http://www.fire.ca.gov/CDFBOFDB/board/board_main.asp.

Public Resources Code section 740 states that the Board "shall represent the state's interest in the acquisition and management of state forests as provided by law and in federal land matters pertaining to forestry, and the protection of the state's interests in forest resources on private lands."

Public Resources Code section 751 states that the purpose of the statutes governing Professional Foresters is to "declare the existence of a public interest in the management and treatment of the forest resources and timberlands of this state."

E. Limitations/Exclusions

If a CRM provides range management services related to the production of forage and livestock on forested landscapes, an RPF shall be consulted if there are potential impacts on related forest resources. California Code of Regulations, title 14, section 1651(b).

Furthermore, Public Resources Code section 756 provides that: "Nothing in [the statutes governing Professional Foresters (sections 750 through 783)] prohibits any person from engaging in those activities otherwise restricted to professional foresters, certified specialists, or qualified but exempt certificants, provided a registrant is in charge of the professional practice or work of that person and all professional work or documents are done by or under the supervision of the registrant."

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California Code of Regulations, title 14, section 1621.1 provides that:

Some forestry-related activities are not considered "forestry work" experience within the meaning of Section 769 of the Code: landscape gardening; horticulture; arboriculture; tree surgery; loading and hauling of logs or other forest products, operations of wood manufacturing or remanufacturing plants; fire lookouts, dispatchers, and fire equipment operators; and agricultural pursuits not related to tree growing.

F. CRMs Are Separately Licensed and Are Not a Specialty Within an RPF License

CRMs are not a specialty within an RPF license, but are separately licensed. Public Resources Code section 772 specifically provides that, instead of being registered as a professional forester, an applicant may request to be registered as a certified specialist in one or more fields of forestry. Also, CRMs are subject to the same disciplinary actions as RPFs. (California Code of Regulations, title 14, section 1650(c)(2).)

ISSUE II: DOES THE BOARD OF FORESTRY AND FIRE PROTECTION HAVE THE AUTHORITY UNDER THE PROFESSIONAL FORESTER'S LAW TO REQUIRE CRM INVOLVEMENT IN RANGE MANAGEMENT PROJECTS THAT OCCUR ON NON-FEDERAL, STATE, AND PRIVATE RANGELANDS?

ANSWER: YES, WHEN THE RANGELAND MANAGEMENT INVOLVES ACTIVITIES UNDERTAKEN ON FORESTED LANDSCAPES.

ANALYSIS:

The Board of Forestry and Fire Protection Has the Authority Under the Professional Forester's Law

Public Resources Code section 740 provides that:

The board shall represent the state's interest in the acquisition and management of state forests as provided by law and in federal land matters pertaining to forestry, and the protection of the state's interests in forest resources on private lands, and shall determine, establish, and maintain an adequate forest policy. General policies for guidance of the department shall be determined by the board.

Pursuant to Public Resources Code section 750, the Professional Foresters Law (Public Resources Code section 750 et seq.) governs the management and treatment of State forest resources and timberlands and to provide for the regulation of persons who practice the profession of forestry and whose activities have an impact upon the ecology of forested

landscapes and the quality of the forest environment. Public Resources Code section 751 states that the purpose of the statutes governing Professional Foresters is to "declare the existence of a public interest in the management and treatment of the forest resources and timberlands of this state and to provide for the regulation of persons who practice the profession of forestry." Public Resources Code section 759 permits the Board to adopt rules to carry out the licensing program and section 762 specifically gives the Board the authority to issue certificates of specialization.

California Code of Regulations, title 14, section 1650 (b) provides that the certified specialty for Certified Rangeland Management shall be implemented and overseen by the Executive Officer, with the assistance of the Examining Committee. California Code of Regulations, title 14, section 739 provides that the Executive Officer is appointed by the Board.

Should the Board ever redefine or expand the CRM certification program, it should ensure that the scope of the services performed pursuant to the certification remains within the definition of forestry and within the authority of the Board.

III. CAUTION RE: UNDERGROUND REGULATIONS

Agencies only have two valid ways to make rules: notice and comment rulemaking and agency adjudication ("precedent decision"), as authorized by Government Code section 11425.60. Regulations must be adopted following the procedures established in the Administrative Procedure Act (APA).

A regulation is defined in Government Code section 11342.600:

Regulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Agency manuals, policies, instructions, advisories, and practices that are not based upon the above two methods are improper, unenforceable, and are considered underground regulations. If a state agency issues, enforces, or attempts to enforce a rule without following the APA, the rule is called an "underground regulation." Underground regulations are specifically prohibited by Government Code section 11340.5(a).

If an agency rule looks like a regulation, reads like a regulation, and acts like a regulation, the court will treat it like a regulation regardless of what the agency labels it. *State Water Resources Control Board v OAL* (1993) 12 Cal.App.4th. 697.

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In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, the California Supreme Court adopted a three-part test for determining whether regulations that have not been adopted pursuant to APA rulemaking procedures are underground regulations:

- 1) Has the Legislature Expressly Exempted the Regulation at Issue from APA Rulemaking? Courts narrowly construe exemptions from the APA, and require that the exemption appear in the authorizing statute. Where the exemption is not in the text of the statute, courts will not look to statements of the bill's author or the legislative history. *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324.
- 2) Does the Agency Intend the Regulation to Apply Generally? A rule, standard or procedure is of "general application" if it applies to an open class. *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622. The number of class members is immaterial; the determining factor is whether the members of the class could change. If the membership could change, the class is open.
- 3) Does the Agency Use the Regulation to Implement, Interpret, or Make Specific the Law Enforced by the Agency? Most Legislative enactments require some agency interpretation. Any agency document or policy, whether labeled interpretive guideline, implementing procedure, legal summary, or internal memo, that goes beyond restating the elements in the statute and is intended to make specific the law administered by the agency, should be adopted pursuant to the APA. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557. When deciding whether a written statement merely restates the statutory requirements, courts have ruled that the restatement must be the "only legally tenable interpretation" of the statute. Government Code section 11340.9(f). Anything else is a regulation.